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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/358,280	07/21/1999	STEVEN M. UTTER	MISTY-52064	1354

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EXAMINER

KIM, CHRISTOPHER S

ART UNIT PAPER NUMBER

3752

DATE MAILED: 06/23/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/358,280

Applicant(s)

UTTER, STEVEN M.

Examiner

Christopher S. Kim

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 Apr & 12 May 2003.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 5,7-12,15-21 and 23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 5,7-12,15-21 and 23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☒ The proposed drawing correction filed on 17 April 2003 is: a) ☒ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. Amendments filed April 17 and May 12, 2003 are acknowledged.
2. Declaration filed April 17, 2003 is acknowledged.
3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Objections

4. The numbering of claims is not in accordance with 37 CFR 1.126 which requires the original numbering of the claims to be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When new claims are presented, they must be numbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claim 22 (new claim 22) has been renumbered as claim 23.

Drawings

5. The proposed drawing correction and/or the proposed substitute sheets of drawings, filed on October 23, 2000 and April 17, 2003 have been approved. A proper drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The correction to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 102

6. Claims 5, 8, 18, 19, 21 and 23 are rejected under 35 U.S.C. 102(b) as being anticipated by Cushing (4,911,339).

With respect to claims 5, 8 and 23, Cushing discloses an apparatus comprising: a pressurizable container 16; means 40 for pressurizing the container; a water conduit 18, 51, 72 (a first conduit 72; a second conduit 18, 51); a spray nozzle 20; a restrictive valve 46; a means for sealing 36,70.

With respect to claims 18, 19 and 21, Cushing discloses an apparatus comprising: a pressurizable container 16; a manual pump 40; a means for delivering fluid (spray nozzle) 20; a means for controlling the emission of evaporative mist (valve) 46; a first conduit 72; a second conduit 18, 51; a means for hands-free directing (clip) 24.

Claim Rejections - 35 USC § 103

7. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339).

Cushing in view of Rosenberg discloses the limitations of the claimed invention with the exception of ice. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have added ice to the container of Cushing to dispense ice water.

8. Claims 7 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339) in view of Shurnick et al. (4,852,781).

Cushing differs from what is claimed in the means secured to the misting apparatus for attaching the misting apparatus to a person's waist. Shurnick et al. discloses a means 27 for securing a bottle to a part of a person's body (waist shown in figure 1). It would have been obvious to a person having ordinary skill in the art at the time of the invention to have replaced cage 30 of Cushing with the means 27 of Shurnick et al. to attach the device of Cushing to a runner.

9. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339) in view of Norman (842,689).

Cushing discloses the limitations of the claimed invention with the exception of the manual piston type pump. Norman discloses a piston pump 7, 11, 12, 13, 17. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have replaced the bellows pump of Cushing with the piston pump of Norman to provide faster compression.

10. Claims 11, 12 and 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cushing (4,911,339) in view of Shurnick et al. (4,852,781) and Roueche et al. (5,186,391).

With respect to claims 11, 12, 15 and 16,

Cushing discloses an apparatus comprising: a pressurizable container 16; a first water conduit 72; means 40 for pressurizing the container; a second water conduit 18, 51; a spray nozzle 20; a clip 24; a restrictive valve 46; and a means for sealing 70. The valve of Cushing inherently has an open position and a closed position. Cushing differs

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from what is being claimed in: the means for pressurizing the container mounted to the inlet; the means for securing the container to the person; and the alligator clip.

Roueché et al. discloses, in figure 13, a piston pump mounted to an inlet cap 118. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have replaced the bellows pump of Cushing with the piston pump of Roueché et al. to provide faster compression.

Shurnick et al. discloses a means 27 for securing a bottle to a part of a person's body (shown as a belt 27 around runner's waist 31 in figure 1). It would have been obvious to a person having ordinary skill in the art at the time of the invention to have replaced cage 30 of Cushing with the means 27 of Shurnick et al. to attach the device of Cushing to a runner.

With respect to claim 17,

Cushing in view of Shurnick et al. and Roueché et al. discloses the limitations of the claimed invention with the exception of ice. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have added ice to the container of Cushing in view of Shurnick et al. and Roueché et al. to dispense ice water.

Response to Arguments

11. Applicant's arguments filed April 17 and May 12, 2003 have been fully considered but they are not persuasive.

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In response to applicant's argument that Cushing fails to disclose "a means for delivering fluid as a continuous evaporative mist," Cushing discloses a means 20 for delivering fluid as a continuous evaporative mist.

In response to applicant's argument that Cushing fails to disclose a "means for hands-free directing of the means for delivering fluid as a continuous evaporative mist," Cushing discloses a means 24 for hands-free directing of the means for delivering fluid as a continuous evaporative mist.

Applicant's declaration under 37 CFR 1.132 is not persuasive. Rejection under 35 USC 102(b) cannot be traversed by a declaration under 37 CFR 1.132. Otherwise, applicant has failed to show commercial success commensurate in scope with the claimed invention. Applicant's assertion of commercial success is a subjective conclusion based on sales data.

Conclusion

12. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Christopher S. Kim whose telephone number is (703) 308-8336. The examiner can normally be reached on Monday - Thursday, 6:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Mar can be reached on (703) 308-20872087. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.


Christopher S. Kim
Examiner
Art Unit 3752

CK
July 15, 2002